

LAW OFFICES

---

**SHOOK, HARDY & BACON**

---

REPORT ON RECENT ETS  
AND IAQ DEVELOPMENTS

---

November 19, 1993

---

**SHB**

2046361907

## — IN THIS ISSUE —

IN THE UNITED STATES

## REGULATORY AND LEGISLATIVE ISSUES

- Trafficant bill to ban smoking in federal buildings passes the House, p. 1.
- Hearings on risk assessment are held in House subcommittee, p. 1.
- Joseph Dear is confirmed as new Assistant Secretary of Labor in charge of OSHA, p. 2.
- Cal OSHA prepares policy directive for IAQ inspections, p. 3.

Special Report beginning on page 5 focuses on regulatory and legislative activity in California, Florida, Maryland and Washington states.

## ETS LITIGATION AGAINST CIGARETTE MANUFACTURERS

- Case filed in Louisiana with ETS allegation, p. 8.
- Senior company executive depositions continue in *Broin*, p. 8. ✓

## ETS/IAQ LITIGATION NOT INVOLVING CIGARETTE MANUFACTURERS

- Two actions are filed under the ADA, p. 9.
- Court temporarily removes asthmatic child from custody of smoking parent, p. 9. ✓

## LEGAL ISSUES AND DEVELOPMENTS

- "Going for Smoke: AG aims to Ban Lighting up at Some Fast-Food Eateries," p. 11.
- Daynard publishes another article on ETS and litigation in *Trial* magazine, p. 11.

## OTHER DEVELOPMENTS/MEDIA COVERAGE

- A Hardee's fast-food restaurant rescinds its smoking ban, p. 11. ✓

SCIENTIFIC/TECHNICAL ITEMS

- Additional details on the National Environmental Tobacco Smoke Conference, p. 12. ✓
- Three new studies relating to ETS and childhood respiratory conditions, p. 14. ✓
- "A Tobacco-Specific Lung Carcinogen in the Urine of Men Exposed to Cigarette Smoke," p. 15.
- "Preliminary Assessment of Designated Smoking Areas for Nonsmoker Exposure to Environmental Tobacco Smoke," p. 15.

IN EUROPE & AROUND THE WORLD

## REGULATORY AND LEGISLATIVE MATTERS

- EC Council addresses smoking in its Safety and Health Directive, p. 16.
- France: one year after public smoking law enacted, p. 16.

## LEGAL ISSUES AND DEVELOPMENTS

- *Who Benefits from WHO?* p. 17.

## OTHER DEVELOPMENTS/MEDIA COVERAGE

- 1994 Winter Olympics in Norway are declared smoke free, p. 17.
- United Nations bans smoking in all its facilities, p. 18.
- "Canadian Navy Butts Out," p. 18.

2046361908

## — TABLE OF CONTENTS —

Issue 60

November 19, 1993

### IN THE UNITED STATES

#### REGULATORY AND LEGISLATIVE MATTERS

##### 103D CONGRESS

- [1] Trafficant Bill on Smoking in Federal Buildings Passes House ..... 1
- [2] House Subcommittee Holds Hearings on Risk Assessment Assumptions ..... 1
- [3] EPA Cabinet Status Legislation Introduced in House ..... 2

##### U.S. OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION (OSHA)

- [4] Joseph Dear Confirmed as Assistant Secretary of Labor in Charge of OSHA ..... 2
- [5] OSHA Drops Participation in Interagency Committees on Smoking and Risk Assessment ..... 3
- [6] California OSHA Prepares Policy Directive for IAQ Inspections ..... 3
- [7] Occupational Health Groups Call For Federal Regulation of Workplace Smoking ..... 3

##### U.S. ENVIRONMENTAL PROTECTION AGENCY (EPA)

- [8] Browner Names New Chair of Science Advisory Board ..... 3
- [9] *ETS Risk Assessment Litigation*: EPA Files Response to Plaintiffs' Motion for Leave to File Sur-reply Brief and Joins Request for Oral Argument on Motion to Dismiss ..... 3
- [10] Carpet Industry Launches Information Program ..... 4

##### ASHRAE

- [11] Committee Makes Progress on Ventilation Standard ..... 4

##### WHITE HOUSE

- [12] Clinton Cigarette Tax Hike Proposal Provokes Varied Reaction ..... 4

##### U.S. GENERAL SERVICES ADMINISTRATION (GSA)

- [13] Notice Given of Potential Change to Smoking Policy ..... 5

##### STATE AND LOCAL GOVERNMENTS

- [14] Special Focus on ETS Activities: California, Florida, Maryland and Washington ..... 5
- [15] State Attorneys General Seek Fast-Food Restaurant Smoking Ban ..... 6
- [16] Privacy Legislation ..... 7
- [17] Other ETS-Related State and Local Legislation ..... 7

#### ETS-RELATED LITIGATION AGAINST CIGARETTE MANUFACTURERS

- [18] *Arabie*: Third Smoking and Health Case with Brief ETS Allegation Filed in Louisiana ..... 8
- [19] *Broim*: More Depositions of Senior Executives Noticed; Defendants to Begin Depositions of Plaintiffs ..... 8
- [20] *Butler*: Argument Scheduled on Defendants' Motion for Summary Judgment ..... 8
- [21] *Dunn*: Argument to be Held on Defendants' Various Motions ..... 9

#### ETS/IAQ LITIGATION NOT INVOLVING CIGARETTE MANUFACTURERS

##### AMERICANS WITH DISABILITIES ACT (ADA)

- [22] *Peterson v. Burger King* (U.S. District Court, Utah) (filed November 3, 1993) ..... 9
- [23] Antismoking Activists Seek Airport Smoking Ban ..... 9

##### CHILD CUSTODY

- [24] *Thomas v. Harris* No. 86-4043-CA (Circuit Court, Duval County, Florida) (temporary custody awarded November 4, 1993) ..... 9

##### CHALLENGES TO SMOKING POLICIES

- [25] *St. Pierre, et al. v. Solnit*, 1993 Conn. Super. LEXIS 2814 (Superior Court, Hartford-New Britain Judicial District, Connecticut) (decided October 21, 1993) ..... 10
- [26] Nursing Home Sues State Over Smoking Policy Order ..... 10

##### WORKPLACE: COLLECTIVE BARGAINING

- [27] Government Unions File Unfair Labor Practices Claim ..... 10

##### WORKPLACE: SICK BUILDING SYNDROME

- [28] *Shaw v. Sacramento Capitol Plaza, et al.*, No. BC074625 (Superior Court, Los Angeles County, California) (filed February 11, 1993) ..... 10

2046361909

## LEGAL ISSUES AND DEVELOPMENTS

- [29] "Going for Smoke: AG aims to Ban Lighting up at Some Fast-Food Eateries," C. Laciast, *The Dallas Morning News*, November 12, 1993 ..... 11
- [30] "Smoking Out the Enemy: New Developments in Tobacco Litigation," R.A. Daynard, *Trial*, November 1993 ..... 11

## OTHER DEVELOPMENTS

- [31] Fast-Food Restaurant Abandons Smoke-Free Experiment ..... 11
- [32] METLIFE Joins ALA Crusade ..... 11
- [33] Denver Health and Hospitals Takes First Step to Smoke-Free Campus ..... 12

## SCIENTIFIC/TECHNICAL ITEMS

## UPCOMING SCIENTIFIC MEETINGS

- [34] The National Environmental Tobacco Smoke Conference: "Public Battles, Private Choices," *IAQ Publications, Inc.*, Washington, D.C., December 16-17, 1993 ..... 12
- [35] Annual Meeting, Society for Risk Analysis, Savannah, Georgia, December 5-8, 1993 ..... 13
- [36] Liability, Compliance, Insurance and Indoor Air Quality, MidAtlantic Environmental Hygiene Resource Center, Philadelphia, Pennsylvania, December 9, 1993 ..... 13
- [37] One Day Overview of Indoor Air Quality, MidAtlantic Environmental Hygiene Resource Center, Philadelphia, Pennsylvania, December 10, 1993 ..... 13
- [38] 9th World Conference on Tobacco and Health, Paris, France, October 10-14, 1994 ..... 13

## LUNG CANCER

- [39] "Risk Factors for Lung Cancer in Non-Smokers in Xuanwei County of China," Q. Lan, W. Chen, H. Chen, and X.-Z. He, *Biomedical and Environmental Sciences* 6: 112-118, 1993 [See Appendix A] ..... 13

## RESPIRATORY DISEASES AND CONDITIONS - ADULTS

- [40] "Passive Cigarette Smoke, Coal Heating, and Respiratory Symptoms of Nonsmoking Women in China," C.A. Pope and X. Xu, *Environmental Health Perspectives* 101(4): 314-315, 1993 [See Appendix A] ..... 14
- [41] "The Prevalence of Inherited and Environmental Factors in Patients with Bronchial Asthma," S. Sreenan, R. Lyons, S. Pathamakanthan, C.K. Power, and C.M. Burke, *Chest* 104(2, Suppl.): 61S, 1993 [See Appendix A] ..... 14

## RESPIRATORY DISEASES AND CONDITIONS - CHILDREN

- [42] "The Associations Between Childhood Asthma and Atopy, and Parental Asthma, Hay Fever and Smoking," M.A. Jenkins, J.L. Hopper, L.B. Flander, J.B. Carlin, and G.G. Giles, *Paediatric and Perinatal Epidemiology* 7: 67-76, 1993 [See Appendix A] ..... 14
- [43] "Effects of Acute Passive Smoking on Exercise-Induced Bronchoconstriction in Asthmatic Children," H. Magnussen, B. Lehnigk, M. Oldigs, and R. Jorres, *Journal of Applied Physiology* 75(2): 553-558, 1993 [See Appendix A] ..... 14
- [44] "Effects of Air Pollution on the Respiratory Tract of Children," R. Schmitzberger, K. Rhomberg, R. Puchegger, D. Schmitzberger-Natzmer, G. Kemmler, and B. Panosch, *Pediatric Pulmonology* 15: 68-74, 1993 [See Appendix A] ..... 14

## OTHER HEALTH ISSUES

- [45] Letters to the Editor Regarding "Relationship of Sudden Infant Death Syndrome to Maternal Smoking During and After Pregnancy," K.C. Schoendorf and J.L. Kiely, *Pediatrics* 90(6): 905-908, 1993 ..... 14

## ETS EXPOSURE AND MONITORING

- [46] "A Tobacco-Specific Lung Carcinogen in the Urine of Men Exposed to Cigarette Smoke," S.S. Hecht, S.G. Carmella, S.E. Murphy, S. Akerkar, K.D. Brunnemann, and D. Hoffmann, *New England Journal of Medicine* 329(21): 1543-1546, 1993 [See Appendix A] ..... 15
- [47] "Preliminary Assessment of Designated Smoking Areas for Nonsmoker Exposure to Environmental Tobacco Smoke," E.N. Light and R. Gay, presented at Indoor Air Quality '93: Operating and Maintaining Buildings for Health, Comfort and Productivity, ASHRAE, Philadelphia, Pennsylvania, November 7-10, 1993 [See Appendix A] ..... 15
- [48] "Mainstream and Sidestream Cigarette Smoke-Induced DNA Adducts in C7B1 and DBA Mice," C.G. Gairola, H. Wu, R.C. Gupta, and J.N. Diana, *Environmental Health Perspectives* 99: 253-255, 1993 [See Appendix A] ..... 15

**SMOKING POLICIES AND RELATED ISSUES**

- [49] "Smoking Control in Restaurants: The Effectiveness of Self-Regulation in Australia," M.J. Schofield, R. Considine, C.A. Boyle, and R. Sanson-Fisher, *American Journal of Public Health* 83(9): 1284-1288, 1993 [See Appendix A] ..... 15

**STATISTICS AND RISK ASSESSMENT**

- [50] "Data Torturing," J.L. Mills, *New England Journal of Medicine* 329(16): 1196-1199, 1993 [See Appendix A] ..... 16

**IN EUROPE & AROUND THE WORLD**

**REGULATORY AND LEGISLATIVE MATTERS**

**COUNCIL OF EUROPEAN COMMUNITIES (EC)**

- [51] EC Council Proposes Addressing Smoking in Safety and Health Directive ..... 16

**FRANCE**

- [52] One Year Anniversary of France Antismoking Legislation ..... 16

**SWEDEN**

- [53] Swedish Campaign Discourages Smoking at Work ..... 16

**LEGAL ISSUES AND DEVELOPMENTS**

**WORLD HEALTH ORGANIZATION (WHO)**

- [54] *Who Benefits from WHO?*, R.D. Tollison & R.E. Wagner, Research Report 18 (Social Affairs Unit, 1993) ..... 17

**OTHER DEVELOPMENTS**

**ASIA**

- [55] "Fired-Up Officials Won't Find Smoke-Filled Rooms At APEC," *The Seattle Times*, November 6, 1993 ..... 17

**NORWAY**

- [56] Lillehammer Organizers Sign "Smokefree Games" Deal ..... 17

**SINGAPORE**

- [57] Employee Complaints of Sick Building Syndrome May Be a Result of Stress or Other Personal Factors ..... 17

**UNITED NATIONS**

- [58] United Nations Resolves To Go Tobacco-Free ..... 18

**MEDIA COVERAGE**

**CANADA**

- [59] "Canadian Navy Butts Out," *Tobacco Control* 2(3): 191, 1993 ..... 18

**UNITED KINGDOM**

- [60] "Millions Lost If Smoking Ban is Introduced," *Morning Advertiser*, November 8, 1993 ..... 18

APPENDIX A ..... Article Summaries

APPENDIX B ..... Upcoming Scientific Meetings

APPENDIX C ..... Attorneys General Report

2046361911

## REPORT ON RECENT ETS AND IAQ DEVELOPMENTS

### IN THE UNITED STATES REGULATORY AND LEGISLATIVE MATTERS 103D CONGRESS

#### [1] **Trafficant Bill on Smoking in Federal Buildings Passes House**

On November 15, 1993, the House passed the bill introduced by Representative James Traficant (D-Ohio) that would restrict smoking in all Federal buildings to designated areas with separate ventilation (H.R. 881). The measure would affect some 12,000 buildings, although it would exempt from its coverage military installations, living quarters, and health care facilities under the jurisdiction of the Secretary of Veterans Affairs. The bill will now be considered by the Senate, where it is reportedly expected to face opposition.

During debate on the measure, Traficant stated that the release of the EPA Risk Assessment on ETS led him to introduce the bill. Representative Richard Durbin (D-Ill.) also cited the ETS risk assessment during his supporting remarks. Durbin stated that 34 percent of businesses responding to a survey in 1991 indicated that their facilities were smoke free. Representative Tim Valentine (D-N.C.) spoke in opposition to the measure, claiming that it is unfair to workers and citizens who smoke. Valentine recently announced he will not run for reelection in 1994, ending his 12 years in Congress.

An issue of contention during the debate was how the measure would be enforced. Traficant agreed that the language of the bill provides sufficient flexibility for each branch of government to devise its own enforcement options as appropriate.

Although no companion measure to H.R. 881 has been introduced in the Senate, Traficant is reportedly expected to lobby for Senate members to introduce such legislation or attach similar language to an appropriations bill. The attempts previously made by Senator Frank Lautenberg (D-N.J.) to attach his

antismoking legislation to appropriations bills failed when the bills were submitted to House and Senate conferees (H.R. 2403; H.R. 2518). See *Associated Press*, November 15, 1993; *Daily Report for Executives*, November 16, 1993; *The Washington Times*, November 16, 1993.

#### [2] **House Subcommittee Holds Hearings on Risk Assessment Assumptions**

A House Energy and Commerce subcommittee reportedly heard testimony on November 17, 1993, regarding whether the EPA's use of assumptions in its risk assessments creates distortions of risk. The subcommittee has jurisdiction over three environmental laws: the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA); the Toxic Substances Control Act (TSCA); and the Resource Conservation and Recovery Act (RCRA).

Those testifying at the hearing included representatives of state and federal governments, researchers, a chemical manufacturer and an environmental group. A summary of hearing testimony and comments follows. See *Daily Report for Executives*, November 18, 1993.

- Subcommittee Chair Al Swift (D-Wash.): Swift criticized the EPA for being reluctant to compare or rank environmental hazards in spite of its Science Advisory Board's (SAB) completion of such a task in 1990 with its report "Reducing Risk: Setting Priorities and Strategies for Environmental Protection."
- Former SAB Relative Risk Committee co-chair Raymond Loehr: Stating that it is difficult to compare risks, Loehr testified that risk assessment was created to evaluate risks in specific circumstances and not to support comparisons.
- EPA assistant administrator for prevention, pesticides and toxic substances Dr. Lynn Goldman: The EPA compares risks every day, Goldman said, but factors other than science, such as the public's expectations and congressional mandates, influence agency decisions.

2046361912

- Ranking minority subcommittee member Representative Michael Oxley (R-Ohio): Oxley's questions of witnesses were focused on the use of assumptions where chemical testing data are insufficient to complete a risk assessment.
- Program manager of the Office of Technology Assessment Michael Gough: Gough testified that there is no scientific consensus that would direct the EPA to use one risk assessment model as opposed to any other. The agency, however, uses the linearized multistage model as a default. He also stated that there is no scientific consensus that there would be a linear cancer response from a low dose exposure to chemicals.

### [3] EPA Cabinet Status Legislation Introduced in House

On November 3, 1993, Representative John Conyers, Jr., (D-MI), introduced legislation that would redesignate the EPA as a cabinet-level department (H.R. 3425). The bill, which was drafted and approved by the House Committee on Government Operations, has 42 original cosponsors. The provisions of the bill establish cabinet status for the EPA and address contract management problems at the agency. The bill does not make any change in existing environmental law or alter any existing environmental policy.

The bill, as introduced, does not contain language relating to risk assessments and cost-benefit analysis, although an effort was made in committee to add this language, and such a provision is one of the 26 amendments that was to be offered when the bill reached the House floor during the week ending November 19, 1993. The Senate version of the bill, which has already been approved in that body, does contain risk assessment provisions (S. 171). In addition, a separate measure that would require the preparation of risk assessments in connection with federal health and safety or environmental regulations was introduced by Representative "Billy" Tauzin (D-La.) on October 27, 1993 (H.R. 3395).

Representatives reportedly expected to support the addition of risk analysis language to H.R. 3425 are John Mica (R-Fla.) and Gary Condit (D-Calif.). Representative Henry Waxman (D-Calif.) and others have apparently vowed to kill the measure if it contains such a provision. *See Inside EPA*, November 5, 1993; *BNA National Environment Daily*, November 15, 1993.

## U.S. OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION (OSHA)

### [4] Joseph Dear Confirmed as Assistant Secretary of Labor in Charge of OSHA

On November 8, 1993, Joseph Dear was confirmed by a voice vote in the Senate to become the new Assistant Secretary of Labor in charge of OSHA. Publicly, Dear has pledged to "revitalize OSHA" and bring a new commitment to the "fundamental mission of saving lives, preventing serious injuries and protecting the health of the American workers."

Dear has been serving as a consultant to OSHA since April 1993; his nomination had been pending since September 7. He continues to serve on a committee formed by Labor Secretary Robert Reich to analyze proposed OSHA reform legislation and develop the Clinton administration's position.

Before joining the Clinton administration, Dear was former Director of Washington state's Department of Labor and Industries. He has also worked for the Washington State Labor Council, People for Fair Taxes, Occupational Safety and Health State Plan Association and the National Association of Governmental Labor Officials.

A press report indicates that mandatory employer-employee safety and health committees and the use of workers' compensation data to target workplaces for safety and health inspections will be top priorities for Dear as OSHA Director. In Washington state, Dear reportedly pioneered the use of workers' compensation data to target safety and health inspections. Media sources say OSHA is expected to be more decentralized under Dear and more efficient in targeting inspections.

Dear has reportedly been praised in the past by business groups who call him a "consensus-builder" and say he communicates effectively with business. He has been said to place emphasis on cooperation rather than confrontation when dealing with worker safety issues. "Joe Dear's record in Washington (state) was clearly one in which he sought to bring the partners together," says a former colleague who was quoted in an article on Dear. Another colleague, when asked about Dear's record in Washington state said, "Overall, he did a pretty good job. He's able to bring everyone to

2046361913

the table, get them talking and get everyone to move forward even when the issues are contentious." See *BNA Daily Report for Executives*, November 10, 1993; *Industry Week*, August 16, 1993; and *Business Insurance*, August 2, 1993.

**[5] OSHA Drops Participation in Interagency Committees on Smoking and Risk Assessment**

According to a press report, OSHA will have 56 fewer interagency committees on which it must serve. Some 40 percent of OSHA's participation in interagency committees were reportedly cut by the Department of Labor, including OSHA's participation on a smoking and health committee, chaired by the Department of Health and Human Services, and four risk assessment panels, i.e., the Federal Liaison Group to the Committee on Risk Assessment Health Standards, Hazard/Risk Assessment of the Integrated Chlorinated Solvent Project, the Interagency Risk Assessment Committee, and the Subcommittee on Risk Assessment.

As part of the Clinton administration's efforts to streamline federal government and improve operations, the Department of Labor overall has apparently eliminated its participation in 165 agency panels. OSHA will remain on 91 panels, including the Committee for Indoor Air Quality (CIAQ), which is headed by the EPA. See *BNA Daily Labor Report*, November 16, 1993.

**[6] California OSHA Prepares Policy Directive for IAQ Inspections**

According to a press report, the California Division of Occupational Safety and Health hopes to complete by the end of the year a policy directive for inspectors to follow during IAQ investigations. Because no such directive currently exists, inspectors apparently take different approaches to such inspections. Key elements of a current draft of the policy reportedly include (i) guidelines for handling complaints, including specific questions; (ii) an investigation protocol on how to interview managers and employees; and (iii) the agency's citation policy. See *BNA California - Safety & Health Report*, November 8, 1993.

**[7] Occupational Health Groups Call For Federal Regulation of Workplace Smoking**

Three occupational health groups have called upon U.S. Secretary of Labor Robert Reich to take immedi-

ate steps to regulate ETS in the workplace. Citing the EPA Risk Assessment on ETS, the American Industrial Hygiene Association, the American College of Occupational and Environmental Medicine, and the American Association of Occupational Health Nurses have written to Reich, asking that OSHA limit its indoor air rulemaking to ETS. The coalition has also issued a position statement that advocates a smoke-free work environment for all employees.

**U.S. ENVIRONMENTAL PROTECTION  
AGENCY (EPA)**

**[8] Browner Names New Chair of Science Advisory Board**

According to a press report, EPA Administrator Carol Browner has named Genevieve Matanoski to replace Raymond Loehr as chair of the agency's Science Advisory Board (SAB). Matanoski, a professor of epidemiology at the Johns Hopkins University School of Hygiene and Public Health, has conducted extensive study on the alleged health effects of electromagnetic fields. She previously served as chair of the SAB's radiation advisory committee.

Although Matanoski's selection was reportedly supported by other board members, EPA sources apparently indicated that SAB executive committee member Morton Lippmann had been the SAB staff's top choice for the post. As a result of another recent selection made by Browner, Lippmann will be replaced as chairman of the SAB's indoor air quality committee by Joan Daisey of the Lawrence Berkeley laboratory's indoor environment program. See *Inside EPA*, November 5, 1993.

**[9] ETS Risk Assessment Litigation: EPA Files Response to Plaintiffs' Motion for Leave to File Sur-reply Brief and Joins Request for Oral Argument on Motion to Dismiss**

The EPA has filed a response to the tobacco industry plaintiffs' motion for leave to file a sur-reply brief in opposition to the motion to dismiss the complaint. The EPA does not object to the granting of the motion for leave "in the interests of a full presentation of the views of all parties," but asserts that it is unnecessary as the EPA's reply brief does not raise any new issues. Further details about the EPA's reply brief and the plaintiffs' sur-reply brief appear in issues 58 and 59 of this Report, October 22 and November 5, 1993.

2046361914

The EPA has also joined the plaintiffs' request that the court hold oral argument on EPA's motion to dismiss. The court has not yet ruled on the oral argument request, nor has the court ruled on either of the pending motions for leave to file *amicus* briefs.

Plaintiffs' complaint in this case seeks a declaration that EPA's decision to designate ETS a Group A carcinogen, together with the risk assessment on which the decision is based, is unauthorized, arbitrary and capricious, violates procedures required by law, and amounts to a denial of due process. Plaintiffs also seek a permanent injunction requiring EPA to withdraw the Group A designation and the underlying risk assessment. *Flue-Cured Tobacco Cooperative Stabilization Corporation, et al. v. EPA* (U.S. District Court, Middle District, North Carolina) (filed June 22, 1993).

#### [10] Carpet Industry Launches Information Program

The carpet industry has developed a consumer information label which will be placed on all "point-of-purchase carpet samples" manufactured after January 1, 1994, according to the Carpet and Rug Institute, the trade organization representing the interests of carpet manufacturers. The label, in conjunction with a "Carpet Owner's Manual," reportedly discusses proper installation techniques for new carpeting. The information program was developed in response to public concerns about carpet emissions. Providing input into the program were members of Congress, the EPA and the Consumer Product Safety Commission.

The Advancement of Sound Science Coalition (TASSC), a newly formed nonprofit group of scientists and representatives of universities, independent organizations and industry, reportedly lauded the announcement of the Carpet and Rug Institute. According to Garrey Carruthers, former governor of New Mexico and chairman of TASSC, "This is a good example of how science and policy decisions should work. Public policy should be driven by sound science and a valid peer-reviewed process – not by emotions, 'panics' or those that have a predetermined policy objective." See *U.S. Newswire*, November 15, 1993.

## ASHRAE

#### [11] Committee Makes Progress on Ventilation Standard

The ASHRAE committee that is considering changes to Ventilation Standard 62-1989 met on November 5-7, 1993. The chair of the committee hopes to have a final consensus draft available for consideration during the ASHRAE winter meeting in January 1995, and a public comment version to be released by ASHRAE in March 1995. Among the proposals approved by the committee is a statement that the standard is not intended to provide acceptable indoor air quality for especially sensitive or susceptible individuals. Committee disagreement over the definition of acceptable indoor air quality and over methodology in the calculation of ventilation rates continues.

## WHITE HOUSE

#### [12] Clinton Cigarette Tax Hike Proposal Provokes Varied Reaction

According to press reports, President Bill Clinton's proposal to raise taxes on cigarettes and other tobacco products has been sharply criticized by cigarette vendors and those lawmakers who represent tobacco-growing states or who generally oppose any tax proposals. The tax hike, which is expected to reduce the numbers of smokers, has been viewed by public health officials as beneficial to nonsmokers. See issue 59 of this Report, November 5, 1993.

In Canada, where high cigarette taxes reportedly have led to the extensive smuggling of cheaper contraband cigarettes from the United States, government officials are reportedly considering lowering their taxes to equalize prices on cigarettes and to end the smuggling trade, which is apparently costing millions of dollars in lost tax revenues each year. See *St. Louis Post Dispatch*, October 30 and November 7, 1993; *The Gazette* (Montreal), November 4, 1993.

2046361915

## U.S. GENERAL SERVICES ADMINISTRATION (GSA)

### [13] Notice Given of Potential Change to Smoking Policy

Federal buildings operator GSA recently included in a notice of "prerule stage" a provision indicating that it will revise its current policy on smoking in GSA-controlled buildings if Congress votes or an executive order is issued to ban smoking in Federal buildings. The GSA currently permits smoking in designated smoking areas as determined by the occupant agency head. The EPA Risk Assessment on ETS is cited in the notice.

## STATE AND LOCAL GOVERNMENTS

### [14] Special Focus on ETS Activities: California, Florida, Maryland and Washington

The states of California, Florida, Maryland and Washington have recently proposed certain initiatives that, if adopted, could have an impact upon the public debate over ETS, either by pronouncing that ETS is responsible for significant adverse health effects or by subjecting smokers to broad new restrictions. A summary of activities in these states follows.

- **California.** Under the Safe Water and Toxic Enforcement Act of 1986 (Proposition 65), the state has been requiring warnings to the public about chemicals known to the state to cause cancer or reproductive toxicity. "Tobacco smoke" has been on the "cancer list" since 1988. ETS has not been on the "reproductive toxicity list," and, prior to this year, had been given a low priority for consideration on this list under the ranking scheme employed by the Proposition 65 Scientific Advisory Panel.

A new ranking scheme, known as DELPHI, was adopted at an October 25, 1993, meeting of the Developmental and Reproductive Toxicant Identification Committee (DART). Pursuant to this procedure, ETS has now been listed as a high priority for consideration.

The legislature considered a number of antismoking measures during its latest session. A.B. 13, which would ban smoking in most workplaces, restaurants, malls, hotels, airports and other public places

remained in committee when the legislature adjourned on September 10, 1993. *See* issue 55 of this Report, September 10, 1993. A competing measure, A.B. 996, which would have invalidated local smoking restrictions and bans and would have permitted most business owners to set their own smoking policies, was withdrawn from consideration by its sponsor. *See* issue 54 of this Report, August 27, 1993.

Meanwhile, in a move criticized by antismoking activists, Governor Pete Wilson (R) reportedly appointed Kimberly Belshe as the state's new director of health services. Belshe at one time worked for a public relations firm on behalf of the tobacco industry to defeat the measure that taxes cigarettes to fund antismoking programs (Proposition 99). According to a press report, Belshe, who is not a physician, has served as the key architect of many of the health programs initiated by the Wilson administration. As director of health services, Belshe will be called upon to direct the state's antismoking programs and formulate strategies to combat smoking. Stanton Glantz has been quoted as saying, "I am absolutely shocked that the governor would name her health director. She is absolutely unqualified and a completely inappropriate choice." *See Sacramento Bee and Los Angeles Times*, November 10, 1993.

- **Florida.** The Department of Health and Rehabilitative Services is poised to adopt rules to implement the Florida Clean Indoor Air Act. Fla. Stat. ch. 386.201-.211. The proposed rules, Fla. Admin. Code r. 10D-105.008-.012, have been subject to public comment in 1993. They designate the procedures to be followed by enforcement personnel who investigate complaints about ETS under the Act. The rules also designate the types of citations and fines that can be assessed for violations. Fines as high as \$500 a day can be imposed for violations such as (i) designating more than one-half of the rooms in a health care facility as smoking; (ii) permitting or designating smoking in a common work area without employee consent; and (iii) designating smoking in common areas that are expected to be used by the public. Because the proposed rules have been challenged, their final adoption is on hold pending the decision of an administrative hearing officer.

2046361916

In the Florida Legislature, a bill that would require the Department of Management Services to evaluate and develop programs to improve indoor air quality in state buildings was prefiled on November 17, 1993 (H.B. 251). Further information about the measure was not immediately available.

- **Maryland.** Although Secretary of Licensing and Regulation William Fogle, Jr., has withdrawn his abrupt proposal to adopt an emergency temporary standard to ban smoking in virtually every workplace in the state, rulemaking on a similar proposal has been initiated and will be subject to comment at public hearings on December 9, 1993, in Crownville, and on December 16, 1993, in Frederick. The proposed regulation would simply require that employers ensure that employees, while in the workplace, do not smoke. Public comment is being accepted on the proposal.

Fogle was reportedly prompted to undertake his initiative after three maintenance workers were killed when a match used to light a cigar ignited solvent that was being used to strip a gymnasium floor in a Baltimore school. Fogle has also justified the measure on the basis of Maryland's alleged high cancer rate, which he attributes in part to ETS exposure.

If an emergency regulation had been adopted, the Legislature's Joint Committee on Administrative, Executive and Legislative Review would have had the power to veto the proposal. This committee cannot, however, veto regulations that undergo the usual regulatory process, which has now been launched. The Senate chair of the joint committee has reportedly indicated that the committee may still hold a hearing on the proposal and request changes. According to a press report, similar measures introduced in the General Assembly over the past three years have been unsuccessful.

Public reaction to the regulatory proposal has apparently been mixed. A spokesperson for Governor Donald Schaefer (D) said the governor "is not yet ready to embrace this proposal." See *Baltimore Morning Sun*, October 29, 30 and November 4, 1993; *The Washington Times*, November 5, 1993.

- **Washington.** The Department of Labor and Industries has been considering rules on indoor air quality for the past two years. In December 1993,

public hearings will be held throughout the state to consider its latest proposal for IAQ occupational health standards. Chapter 296-62 WAC. Under the proposal, which includes comprehensive provisions on ventilation, smoking in the workplace would be restricted to separately ventilated "smoking break rooms." An appendix with information about organizations offering smoking cessation information and programs is included.

The proposed standards, if adopted, will become effective for employers with 20 or more office employees on September 1, 1994. Employers with less than 20 employees would have to comply by March 1, 1995. The same "phased in" schedule applies to building owners having control over office work environments with the same numbers of workers.

Public hearings have been scheduled for December 7, 8 and 9, 1993, in six different cities. Written comments are also being accepted. Joseph Dear, the former secretary of the Department was recently confirmed as assistant secretary of labor in charge of U.S. OSHA.

- **Privacy Legislation.** "Privacy legislation," i.e., statutes that protect workers who smoke off the job or, more generally, use legal products or engage in legal activities outside the workplace, have been contested recently in these states, none of which has adopted such a proposal. Measures that would have protected smokers from job discrimination were defeated in 1992 and/or 1993 in all four states.

#### [15] State Attorneys General Seek Fast-Food Restaurant Smoking Ban

Relying heavily on the EPA Risk Assessment on ETS, attorneys general from 15 states have prepared a report that calls upon fast-food restaurants to voluntarily ban smoking to protect young customers and workers. The report, entitled "Fast Food, Growing Children and Passive Smoke: A Dangerous Menu," was signed by the attorneys general of Arizona, Connecticut, Idaho, Iowa, Massachusetts, Minnesota, Mississippi, New Mexico, New York, Oklahoma, Oregon, Texas, Utah, Vermont and Wisconsin, along with the Hawaii Office of Consumer Protection. A copy of the report is attached as Appendix C.

2046361917

Spokespersons for the fast-food restaurants reportedly stated that it is up to state legislatures, expressing the will of the people, to pass laws on such issues. See *Associated Press*, *UPI* and *Reuters*, November 8, 1993; *The Dallas Morning News*, November 9, 1993.

#### [16] Privacy Legislation

A bill that would prohibit employers from requiring workers to refrain from, or engage in, any legal behavior while off the job was introduced in the Michigan Senate on October 20, 1993 (S. 904).

During 1993, privacy legislation has been enacted in two jurisdictions, Montana and the District of Columbia, and amended in North Dakota. According to information from The Tobacco Institute, such legislation has been defeated this year in 14 states (Alabama, Alaska, Arizona, California, Delaware, Florida, Georgia, Hawaii, Idaho, Iowa, Kansas, Nebraska, Virginia and Washington). The defeat in Virginia was by veto.

Privacy legislation currently is pending in five states: Illinois, Massachusetts, Michigan, Ohio and Pennsylvania.

Currently, 29 states and the District of Columbia prohibit employment discrimination based on lawful off-the-job activities, which activities specifically or necessarily include the use of tobacco products. The 29 states are as follows:

Arizona	Colorado	Connecticut
Illinois	Indiana	Kentucky
Louisiana	Maine	Minnesota
Mississippi	Missouri	Montana
Nevada	New Hampshire	New Jersey
New Mexico	New York	North Carolina
North Dakota	Oklahoma	Oregon
Rhode Island	South Carolina	South Dakota
Tennessee	Virginia	West Virginia
Wisconsin	Wyoming	

Delaware adopted a similar directive by executive order in 1989.

#### [17] Other ETS-Related State and Local Legislation

##### •Local Governments in California

*Ojai*. On November 23, 1993, the City Council is scheduled to vote on a proposed ordinance that would prohibit smoking in a number of outdoor locations,

including restaurant dining patios and city parks. According to a newspaper report, the council has indicated it will support the measure. See *Los Angeles Times*, November 11, 1993.

*Santa Clara*. On November 9, 1993, the City Council directed staffers to draw up a proposed ordinance that would prohibit smoking in virtually all indoor public places, including private businesses, restaurants and bars. The council reportedly is expected to vote on the proposal in early or mid- December. See *The San Francisco Chronicle*, November 11, 1993.

*Santa Monica*. The City Council has passed an ordinance that prohibits smoking in restaurant dining areas but permits it in restaurant bars. An effort by two council members to prohibit outdoor smoking on restaurant patios reportedly failed by a vote of 5-2. See *Los Angeles Times*, November 4, 1993.

*Ventura County*. On November 16, 1993, the Board of Supervisors unanimously approved a smoking restriction ordinance affecting unincorporated areas of the county. The ordinance prohibits indoor smoking in virtually all public places except bars and tobacco shops. According to a newspaper article, the prohibition against smoking includes patrons of private party rooms and actors smoking on stage. The law will take effect on Valentine's Day, February 14, 1994. See *Los Angeles Times*, November 17, 1993.

*Westlake Village*. By unanimous vote, the City Council has approved an ordinance that reportedly prohibits indoor smoking in almost all places except restaurant bar areas that are separately ventilated, smoking rooms in hotels, private residences, clubs and some commercial establishments. The council's vote came on November 11, 1993. It was reported that "not a single person spoke against the issue at a public hearing." See *Los Angeles Times*, November 12, 1993.

##### •Hawaii

The state's Office of Consumer Protection reportedly is asking for public comment on a preliminary report recommending that smoking be prohibited at fast-food restaurants. See *USA Today*, November 9, 1993. Hawaii's director of consumer protection is a co-sponsor along with 14 other attorneys general of the report entitled, "Fast Food, Growing Children and Passive Smoke: A Dangerous Menu." See Appendix C of this Report.

2046361918

### •Local Government in Missouri

*St. Charles County.* The County Council has overridden the County Executive's veto of an ordinance banning smoking in county government buildings. The law takes effect December 6, 1993. Penalties for violating the measure reportedly include up to one year in jail and a \$1,000 fine. According to a newspaper article, crimes with comparable penalties include third-degree assault, theft of cable television service, use or possession of drug paraphernalia and littering. See *St. Louis Post Dispatch*, November 11, 1993.

## ETS-RELATED LITIGATION AGAINST CIGARETTE MANUFACTURERS

### [18] *Arabie*: Third Smoking and Health Case with Brief ETS Allegation Filed in Louisiana

On October 5, 1993, George Covert filed a third smoking and health case with an allegation made in passing that the plaintiff, Clifton Arabie, was harmed by exposure to environmental tobacco smoke in addition to smoking cigarettes. American, Liggett and R.J. Reynolds are the tobacco defendants in the case, filed in the District Court of Jefferson Parish, Louisiana. Mr. Covert's three most recent cases, *Arabie*, *Chustz* and *Cornealius Williams*, have contained an ETS allegation that was not the focus of the case. *Arabie v. R.J. Reynolds Tobacco Co., et al.* (District Court, Jefferson Parish, Louisiana) (filed October 5, 1993).

### [19] *Broin*: More Depositions of Senior Executives Noticed; Defendants to Begin Depositions of Plaintiffs

On November 5, 1993, plaintiffs served notices for additional depositions of executives of various defendants. Dr. James Glenn, President of the Council for Tobacco Research, is to be deposed on November 29. Arthur Stevens, Vice President and General Counsel of Lorillard Tobacco Co. (but noticed due to his capacity as a director of CTR), is to be deposed on December 3. Laurence Tisch, co-CEO of Loews Corporation, is to be deposed on December 6, as is Ellen Merlo, an official of Philip Morris Incorporated's Government Affairs Department. Dr. Harmon McAllister, CTR's Scientific Director, and Dr. David Stone, CTR's Associate Research Director, are both to be deposed on

December 7. Preston Robert Tisch, co-CEO of Loews Corporation, is to be deposed on December 9.

Bennett Lebow of Liggett Group was deposed by plaintiffs on November 5. Plaintiffs are still scheduled to depose four representatives of The Tobacco Institute – Samuel Chilcote, Walker Merryman, Brennan Dawson and Thomas Lauria – on November 18-19.

Defendants have noticed two of the plaintiffs for deposition on November 30-December 2. Plaintiff Valerie Gibson is to be deposed on November 30 and the morning of December 1; plaintiff Patricia Crittenden is to be deposed on the afternoon of December 1 and on December 2.

Plaintiffs' counsel has informed defendants that plaintiff Gary Hayes will voluntarily dismiss his claim. An order of dismissal has not been entered.

At issue in this case are the claims of 28 flight attendants allegedly injured by occupational exposure to ETS. In addition, the husband of one of the flight attendants claims loss of consortium. The 28 attendants purport to represent a class of approximately 60,000 other attendants. Plaintiffs' class action allegations have been dismissed by the trial court; plaintiffs' appeal of that dismissal is pending in the Florida Court of Appeal.

Injuries alleged by the putative class representatives include lung cancer, breast cancer and unspecified respiratory ailments. Plaintiffs further allege that occupational exposure to ETS on board aircraft causes at least 22 diseases and a reasonable fear of contracting such diseases. The defendants are purported to be the six major U.S. cigarette manufacturers (plus related entities), UST, Inc., United States Tobacco Company, Dosal Tobacco Corp., the Council for Tobacco Research, The Tobacco Institute, and three trade associations. *Broin, et al., v. Philip Morris, et al.* (Circuit Court, Dade County, Florida) (filed October 31, 1991).

### [20] *Butler*: Argument Scheduled on Defendants' Motion for Summary Judgment

The hearing on defendants' motion for partial summary judgment will be held on December 13, 1993. Defendants seek summary judgment on plaintiffs' failure to warn and concealment claims based on preemption and on plaintiffs' remaining claims (except for design defect) based on state law grounds.

2046361919

In other activity, defendants deposed several fact witnesses on November 16-17.

Plaintiffs contend that Burl Butler, a barber from Laurel, Mississippi, developed lung cancer as a result of his exposure to environmental tobacco smoke. The defendants in this case consist of the six major U.S. cigarette manufacturers and several local retailers. *Butler v. R.J. Reynolds Tobacco Company, et al.* (Circuit Court, Hinds County, Mississippi) (filed October 21, 1992).

#### [21] *Dunn*: Argument to be Held on Defendants' Various Motions

Argument is scheduled for December 2, 1993, on defendants' various motions. Argument will be heard on the motion to transfer venue from the Circuit Court of Delaware County, Indiana, to the Circuit Court of Grant County, Indiana, that was filed jointly by the cigarette manufacturing defendants, The Tobacco Institute and the Council for Tobacco Research, and on the separate motions to dismiss for lack of personal jurisdiction that were filed by the holding company defendants, American Brands, Loews Corp. and RJR Nabisco Holdings Corp.

Plaintiffs in this case contend that Mildred Wiley was a nonsmoker who died of lung cancer as a result of workplace exposure to environmental tobacco smoke. Her husband, Philip Wiley, is also asserting a loss of consortium claim. Defendants in the case are each of the six major U.S. cigarette manufacturers, parent companies of three of the manufacturers, The Tobacco Institute, and the Council for Tobacco Research. *Dunn v. RJR Nabisco Holdings Corporation, et al.* (Superior Court, Delaware County, Indiana) (filed May 28, 1993).

### ETS/IAQ LITIGATION NOT INVOLVING CIGARETTE MANUFACTURERS

#### AMERICANS WITH DISABILITIES ACT (ADA)

#### [22] *Peterson v. Burger King* (U.S. District Court, Utah) (filed November 3, 1993)

A 44-year-old man who allegedly suffers from "lung disease" has apparently filed a complaint under the ADA against ten Salt Lake City area restaurants and two bowling alleys, claiming that they have denied him

equal access by allowing ETS to drift into nonsmoking areas. Among those named as defendants are Burger King, Blimpie Sandwiches, and the Belgian Waffle and Omelet Inn.

Plaintiff Calvin Peterson is not apparently seeking a complete smoking ban as an accommodation of his alleged disability, but he is requesting smoke-free access and eating areas. Peterson is reportedly being represented by attorney Kate Toomey.

The Burger King outlet named in the litigation reportedly banned smoking beginning November 1, 1993, and a spokesperson for Blimpie Sandwiches has indicated that it may ban smoking as well. The Utah legislature rejected a measure during its last session that would have banned smoking in public buildings that do not have smoking rooms with separate ventilation. According to a state senator, a new proposal to ban smoking will be introduced in 1994. *See Associated Press*, November 4, 1993.

#### [23] Antismoking Activists Seek Airport Smoking Ban

Vivian Dietemann of St. Louis has reportedly filed a complaint against St. Louis and St. Louis County under the ADA seeking to impose a complete smoking ban at the Lambert Field airport. Dietemann, who was joined in the action by flight attendant Patricia Young of Dallas, who alleges that she has asthma and cannot use Lambert Field because she is sensitive to ETS. According to a press report, the St. Louis County Council this year rejected a proposal to confine smoking at Lambert Field to rooms with separate ventilation. Smoking is, however, apparently restricted to bars and restaurants and nine other designated areas. Young is a named plaintiff in *Broin*. *See St. Louis Post Dispatch*, November 9, 1993.

### CHILD CUSTODY

#### [24] *Thomas v. Harris* No. 86-4043-CA (Circuit Court, Duval County, Florida) (temporary custody awarded November 4, 1993)

According to press reports, a circuit court judge has temporarily removed a seven-year-old asthmatic child from the custody of his mother allegedly to protect him from ETS exposure. Although the mother, Nora Kirkpatrick (formerly Nora Thomas), reportedly does

2046361920

not smoke, her new husband and his mother do smoke. According to Kirkpatrick's attorney, the child's stepfather and stepgrandmother do not smoke in the child's presence, and the child's health has been unchanged while living with his mother.

The judge who made the award is a former smoker. After entering the temporary custody order, the judge was quoted as saying, "Secondhand smoke is killing children and impacting their health, and I think it's time for the courts of this country to help these children." An appeal was filed in the case on November 5. See *United Press International and Associated Press*, November 6, 1993.

An appeal was filed in the case on November 5. On November 8, Nora Kirkpatrick moved to disqualify the trial judge, alleging bias and prejudice. According to the motion, no allegation relating to smoking appeared in the motion for temporary custody that was scheduled for hearing on November 1, yet the court -- with no prior notice to the mother -- limited the testimony during the hearing to the subject of smoking.

### CHALLENGES TO SMOKING POLICIES

- [25] *St. Pierre, et al. v. Solnit*, 1993 Conn. Super. LEXIS 2814 (Superior Court, Hartford-New Britain Judicial District, Connecticut) (decided October 21, 1993)

A number of patients and residents of a mental health facility filed a complaint against the commissioner of the Connecticut Department of Mental Health seeking to enjoin the enforcement of a new smoking policy which restricts smoking to two fifteen-minute breaks each day in designated outdoor areas. The plaintiffs claimed that the policy was enacted in violation of the state's Administrative Procedure Act. Finding that the plaintiffs had failed to exhaust their administrative remedies by first petitioning the defendant for a declaratory ruling, the court granted the defendant's motion to dismiss the case.

- [26] *Nursing Home Sues State Over Smoking Policy Order*

According to a press report, a nursing home near Rochester, New York, filed suit after the state Health Department ordered the home to designate a room in

the facility in which residents can smoke. The 72-bed home, Maplewood Nursing Home, which opened in 1947, always prohibited residents from smoking indoors. Five years ago, the facility reportedly banned smoking completely when staff members were prohibited from smoking.

A state inspector allegedly informed Maplewood this year that it needed a smoking room. The decision of the Health Department was apparently based upon the state's "nursing home residents' bill of rights." According to an attorney for the Health Department, residents cannot be prohibited from smoking in what is essentially their home. See *Associated Press*, November 11, 1993.

### WORKPLACE: COLLECTIVE BARGAINING

- [27] *Government Unions File Unfair Labor Practices Claim*

According to a press report, unions representing Bucks County employees filed a complaint with the Pennsylvania Labor Relations Board after county officials unilaterally instituted a smoking ban in all county facilities on March 1, 1993. The previous smoking policy, which permitted smoking in designated areas, was apparently negotiated during contract talks in late 1990. According to union officials, the change in policy represents a working condition that is subject to negotiation. See *Philadelphia Inquirer*, November 11, 1993.

### WORKPLACE: SICK BUILDING SYNDROME

- [28] *Shaw v. Sacramento Capitol Plaza, et al.*, No. BC074625 (Superior Court, Los Angeles County, California) (filed February 11, 1993)

Two state employees have sued the owner and operators of the building in which they work, alleging that they are suffering from respiratory and pulmonary symptoms, permanent allergies, chemical low tolerance levels and emotional distress due to sick building syndrome. According to a press report, the parties to the litigation are negotiating over an agreement to transfer the action to Sacramento County, where the building and witnesses are located. See *Indoor Pollution Law Report*, October 1993.

2046361921

Plaintiffs Sharon Shaw and Mary Howe Hight initially filed the complaint *pro se* but are now represented by Los Angeles attorney David Rosen. The complaint contains counts of negligence, strict liability, breach of implied warranties of fitness and merchantability, breach of express warranty, fraud and conspiracy.

The plaintiffs' allegations include the following: (i) the defendants permitted the building to be occupied without first leaching out all noxious chemicals and substances; (ii) the air conditioning system was not properly balanced; (iii) the defendants permitted the use of materials and substances in construction that offgas formaldehyde and other noxious substances; (iv) the defendants failed to heed reports of sick building syndrome and failed to take precautions to prevent its occurrence; and (v) the defendants misrepresented the condition of the building as safe and concealed the adverse effects of the materials and substances permitted to offgas into the building.

According to the plaintiffs' attorney, possible causes of the plaintiffs' health conditions are problems with the building's HVAC system, which permitted contaminants to be recirculated in the building, and mildew and spores, which developed after a reroofing project. The plaintiffs are seeking general damages, medical and related expenses, lost earnings and earning capacity, punitive damages and costs of suit.

---

#### LEGAL ISSUES AND DEVELOPMENTS

- [29] "Going for Smoke: AG aims to Ban Lighting up at Some Fast-Food Eateries," C. Laciast, *The Dallas Morning News*, November 12, 1993

This article profiles the efforts undertaken by Texas Attorney General Dan Morales to ban smoking in fast-food restaurants. Morales has brought legal actions against businesses under the state's deceptive trade practices laws, claiming that such laws are violated when designated nonsmoking areas share a ventilation system with designated smoking areas.

A number of restaurant representatives are quoted in the article. Although some believe a smoking ban would have no appreciable impact on business, they say that Morales' request that they impose such bans voluntarily would place individual restaurant owners at

a disadvantage. The targets of Morales' initiatives, Luby's Cafeteria and Whataburger, reportedly complain that the issue has political overtones.

The article asserts that some 1,500 of 6,000 McDonald's restaurants nationwide are now smoke free, as are 600 of Burger King's 6,000 restaurants. A spokesperson for Burger King is quoted as saying that the company has been "getting letters on both sides of the issue." A Hardee's spokesperson states that a smoking policy probably cannot be imposed on franchisees.

- [30] "Smoking Out the Enemy: New Developments in Tobacco Litigation," R.A. Daynard, *Trial*, November 1993

This article, by the chair of the Tobacco Products Liability Project, discusses developments in the law regarding ETS litigation, among other matters. Richard Daynard addresses the EPA Risk Assessment on ETS, the U.S. Supreme Court decision in *Helling v. McKinney*, 113 S. Ct. 2475 (1993), and the complaints that have been filed against fast food restaurants under the Americans with Disabilities Act.

---

#### OTHER DEVELOPMENTS

- [31] Fast-Food Restaurant Abandons Smoke-Free Experiment

A Hardee's restaurant in Danville, Illinois, which opened on July 8, 1993, has reportedly established a designated smoking area after experimenting with a smoking ban. According to a Hardee's marketing manager, public response was split evenly over the ban. Since rescinding the ban, some customers have reportedly expressed their appreciation of the policy change by visiting the site more frequently. See *Gannett News Service*, November 12, 1993.

- [32] METLIFE Joins ALA Crusade

Citing employers' concerns about rising medical costs, along with a continuing focus on wellness initiatives in its managed care operations, Metropolitan Life Insurance Company has reportedly introduced a smoking cessation program for members of its affiliated HMOs through a cooperative arrangement with the American Lung Association (ALA). METLIFE says it is

2046361922